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Supreme Court of the United States

OCTOBER TERM, 1949.

UNITED STATES OF AMERICA, *Appellant*,

v.

PAIGE, DAVIS & COMPANY, *Appellee*.

MOTION TO AFFIRM

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Supreme Court of the United States

OCTOBER TERM, 1958

No. 567

UNITED STATES OF AMERICA, *Appellant*,

v.

PARKE, DAVIS & COMPANY, *Appellee*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

Pursuant to Rule 16, para. 1(c), of the Revised Rules of this Court, appellee moves that the judgment of the District Court be affirmed on the ground that the questions raised by appellant are so unsubstantial as not to warrant further argument.

INTRODUCTION

This is a conspiracy case under Sections 1 and 3 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, 3. The crucial issue is whether or not in fact a conspiracy or other agreement was entered into by appellee Parke, Davis & Company (hereinafter Parke, Davis). The District Court, after hearing and evaluating the testimony of some 17 witnesses called by the Government, found that the Government had failed to

prove a conspiracy, and accordingly dismissed the complaint.

The basic question presented by this appeal is whether or not the District Court's evaluation of the extensive oral testimony, and his resulting findings of fact, were "clearly erroneous" under Rule 52(a) of the Federal Rules of Civil Procedure. In spite of appellant's effort in its Jurisdictional Statement to clothe this issue in more attractive raiment, this is all that is involved; no substantial question of law is presented, nor is any problem of general importance, in the administration of the antitrust laws or otherwise. A brief consideration of the evidence before the District Court will show that even this narrow factual question is unsubstantial. Furthermore, the entire controversy is of no importance, as is shown by the District Court's additional conclusion that in any event the case is moot. Accordingly, this motion to affirm should be granted.

STATEMENT

The case involves the refusal of Parke, Davis, during a brief period in 1956, to make its products available to a few retailers in the cities of Washington, D. C. and Richmond, Virginia, whose resale price and advertising policies jeopardized its good will and business relationships with its other customers. This short-lived and largely ineffective attempt to protect its business interests was charged in the complaint and a companion indictment to have constituted a conspiracy.[1] The criminal case was tried in the United

[1] Specifically, Parke, Davis was charged with entering into a combination and conspiracy with five named retailers and five named wholesalers. (Complaint, paras. 5, 6, 13; Plaintiff's Answers to

States District Court for the District of Columbia in October and November, 1957, and ended in an acquittal granted by the trial judge at the close of the Government's evidence.[2] Thereafter, in June, 1958, the companion civil proceeding, which is the subject of the present appeal, came on for trial before a different judge of the same court. Fourteen Government witnesses, and three Parke, Davis representatives called as witnesses by the Government, testified. At the close of the Government's evidence, the court granted Parke, Davis' motion under Rule 41(b) of the Federal Rules of Civil Procedure to dismiss the complaint on the ground that upon the facts and the law the Government had failed to show any right to relief.

The heart of the District Court's decision, supported by specific findings of fact, was the determination that the evidence did not show conspiracy or agreement as alleged in the complaint, but merely lawful unilateral

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Defendant's Interrogatories 1, 2, February 19, 1958). The alleged combination and conspiracy consisted of an "agreement, understanding and concert of action" dealing with four different subjects: the prices at which the retailers would sell Parke, Davis products; the prices at which the retailers would advertise Parke, Davis products; the prices at which the wholesalers would sell Parke, Davis products; and the kinds of retail outlets to which the wholesalers would sell Parke, Davis products. (Complaint, para. 14; Plaintiff's Answers to Defendant's Interrogatories 4(a), 4(c), February 19, 1958).

The statements of questions presented in the Notice of Appeal and the Jurisdictional Statement do not include the latter two aspects of the alleged conspiracy (wholesalers' prices, and the kinds of retail outlets to which wholesalers were to sell); the Government's claims on these points, therefore, are not before this Court. See Rule 15, para. 1(c), of the Revised Rules of this Court.

[2] The opinion of the trial court (Judge Tamm) is set out in full at 1957 CCH Trade Cases, para. 68,856.

action on the part of Parke, Davis, under the established rule of *United States* v. *Colgate & Co.*, 250 U.S. 300, and related cases.[3] This holding, the subject of the first of the two questions raised by appellant here, is the principal matter presented to this Court.[4]

The phrasing of the first question in appellant's Jurisdictional Statement—and, indeed, its treatment throughout the Jurisdictional Statement—obscures the real nature of the challenge to the District Court's decision. Appellant does not raise any serious question as to the trial judge's understanding or application of the law to the facts as he found them; rather, it challenges his assessment of the evidence presented before him.

[3] In the criminal case, Parke, Davis' motion under Rule 29(a) of the Federal Rules of Criminal Procedure for an acquittal at the close of the Government's evidence was similarly granted upon the ground that the evidence failed to show conspiracy or agreement. The Government's evidence in that proceeding was substantially the same as in this.

[4] The second question presented in the Jurisdictional Statement challenges the District Court's further finding that Parke, Davis had in good faith abandoned the practices challenged by the complaint long before the trial, and his conclusion that even if a conspiracy had been proven there would be no ground for equity to intervene. While appellee considers this ruling of the District Court entirely correct and a sufficient ground for disposing of the case, it does not propose to discuss the question on this motion. For the appeal on this point presupposes error on the first point: only if a violation was in fact shown does the issue of the necessity for relief arise. Since, as will be shown, the District Court was fully justified in finding as a fact that no conspiracy had been proved, there is no need to reach the merits of the mootness question. The District Court's determination that in any event the case is moot does, however, further emphasize the unimportance of the whole controversy.

Although nowhere in the Jurisdictional Statement is this made clear, appellant is asking this Court in effect to examine all the testimony and exhibits presented to the court below, to overturn the explicit findings of the trial court, and to hold that the evidence shows conspiratorial rather than unilateral action.

This effort to obtain a trial *de novo* of the evidence does not present a substantial question warranting plenary consideration here. The unchallenged findings of the District Court, together with consideration of the evidence supporting the findings which are challenged, show no substantial error and demonstrate that no conspiracy or agreement was proved. This analysis will also show that the law was properly applied by the trial judge to the facts he found.

The Undisputed Facts As Found By The District Court[3]

Parke, Davis is a manufacturer of pharmaceutical products. It competes with some 2,000 other manufacturers of such products (Fdg 3; Tr. 173), none of which is involved in this case, and its sales account for less than 5 per cent of the total sales of pharmaceutical

[3] The facts recited here are those embodied in findings of fact and supporting evidence are not challenged by appellant in the Jurisdictional Statement. Appellant contends, in footnote 3 of the Statement, that its recital of the facts is based upon evidence that is "substantially uncontradicted." However, as will appear in the succeeding section of this motion, much of such evidence is in fact either contradicted or of doubtful weight. It may also be noted that most of appellant's version of the facts was submitted to the District Court in the form of proposed findings of fact and proposed amendments to the court's findings of fact; all of which were rejected by that court.

products in the District of Columbia and in Richmond, Virginia (Fdg 3; Tr. 396).[6] Competition in the business is intense (Fdg 4; Tr. 400, 402-03), and there has been no claim in this case that the prices of Parke, Davis' 600-odd products are not competitive with the prices of the other 168,000 products in the field (Fdg 4; Plaintiff's Answer to Defendant's Interrogatory 6(1)(a), January 2, 1958).[7]

Parke, Davis sells its products to retail drugstores both directly and indirectly, through wholesalers; the retailers in turn resell the products to members of the consuming public (Fdgs 5, 1; Complaint and Answer, para. 8, Tr. 27). Parke, Davis not only unilaterally sets the prices at which it sells its products, but in addition unilaterally establishes suggested prices at which the products should be resold by retailers to the public (Fdgs 7-9; Pl. Ex. 1, Tr. 24). Such retail resale prices are enforced by fair trade agreements in states that have fair trade laws, and are suggested for use in states that do not (Fdg 8; Pl. Ex. 1, Tr. 24). In the spring of 1956, Parke, Davis had a policy of refusing to sell to retailers in non fair trade areas who did not observe its recommended resale prices, and of refusing to sell to wholesalers who sold to such retailers (Fdg 11; Tr. 222-23, 315-F, 338-39, 361-62). Parke, Davis had, however, no regularized or systematic machinery for enforcing its policy as to suggested resale prices; it did

[6] By a stipulation at the pretrial proceedings, the Government narrowed its charge regarding Virginia to claim that the alleged conspiracy had effect only in the city of Richmond, rather than in the entire state. (Pretrial Proceedings, April 2, 1958.)

[7] There has been vigorous retail price-cutting and cut-price advertising on other manufacturers' products at all pertinent times in the District of Columbia. (Pl. Ex. 2, 3, Tr. 57-60, Pl. Ex. 7, Tr. 110-11, Pl. Ex. 8, 9, Tr. 112-13; Tr. 315-J, 315-K, 352-53, 402-03.)

not, for instance, regularly shop stores or maintain card index files of offenders; and there is no evidence that it sought or obtained the cooperation of retailers or wholesalers in reporting or policing deviations from its suggested prices (Fdg 10; Tr. 343).

In 1956, neither the District of Columbia nor the State of Virginia had a fair trade law in effect (Fdg 6; Tr. 322).[2] Before the summer of that year, however, Parke, Davis' policy regarding suggested retail prices was not being applied in the District of Columbia or in Richmond, Virginia. Although there was some price cutting on Parke, Davis products (Fdg 12; Tr. 315-11, 364), it was not sufficiently prevalent to cause concern to the Parke, Davis branch manager in Baltimore who was responsible for this area (Fdg 12; Tr. 315-1, 315-J). Having recently been transferred into the area from a region where fair trade laws were in effect, the branch manager was in fact not even aware that Parke, Davis had a policy of attempting to obtain observance of its resale prices in non-fair trade areas by refusals to sell (Fdg 12; Tr. 360, 365, 409). In the spring of 1956, however, advertising of deep price cuts on Parke, Davis products by a retailer in the District of Columbia, Dart Drug Company, had become a matter of concern (Fdg 12; Tr. 315-J). The prices Dart Drug offered on some products of Parke, Davis principally certain vitamins were below those at which small retailers could purchase the same products (Fdg 16; Tr. 85). One of the purposes of such advertising was to attract customers who, though they requested Parke, Davis' products, might be induced to buy other, more profitable brands instead (Fdg 16; Tr. 89-91, 340-41). Such ad

[2] Virginia has since reinstituted such a law. See Va. Code §§ 59-84 to 59-89 (1958 Supp.).

vertising injured the good name and marketability of Parke, Davis' products and resulted in Parke, Davis losing the confidence of a great many of the retailers upon whom it relied for the promotion of its goods (Fdg 16; Tr. 340-42, 398-400).

Parke, Davis' branch manager, therefore, sought guidance at a sales meeting at Parke, Davis' headquarters in Detroit, where he was informed of the company's policy of refusing to sell to price cutters in non-fair trade areas (Fdg 12; Tr. 363-66). He thereupon put that policy into effect by instructing his assistants and Parke, Davis' salesmen to inform the trade in the District of Columbia and Virginia that it was Parke, Davis', policy not to sell to any retailer who resold Parke, Davis products below the suggested prices, and not to sell to any wholesaler who in turn sold those products to such a retailer (Fdg 12; Tr. 367). Parke, Davis' representatives were neither instructed nor authorized to seek agreements on this subject from either retailers or wholesalers, but were merely instructed to state the policy regarding retail prices and its consequences (Fdg 12; Tr. 397-98).[7] Pursuant to these instructions, Parke, Davis' salesmen and field managers did, in July, 1956,

[7] The following testimony by Parke, Davis' branch manager is uncontradicted:

> Q. When you talked to your salesmen, you were asked about your discussion with Mr. Cummings and Mr. Powers, did you authorize any of them to go out and make agreements with any of your customers about prices?
>
> A. No, we didn't seek agreements at any time, nor did I ask our men to seek agreements. I told them to state the policy and the consequences.
>
> Q. The policy was that the wholesalers could not sell to price-cutting retailers?

announce the policy to both retailers and wholesalers in the District of Columbia and in Richmond (Fdg 12; Tr. 368-69, 402).

Upon being informed of Parke, Davis' policy, one retailer organization, the Drug Mart group—a cooperative buying and advertising organization of some 30 independent retailers—ceased its occasional joint advertising of cut prices on Parke, Davis products, although the member stores were entirely free to sell those products, or even advertise them individually, at whatever prices they wished (Fdg 22; Tr. 108-09, 120-22, 186-88). Likewise upon being informed of Parke, Davis' policy, a representative of one other retailer, Peoples, stated that he would cease cutting prices on Parke, Davis products (Fdg 19; Tr. 320-21, 346).

Despite the announcement of Parke, Davis' policy, however, five other retailers, Dart Drug, Standard Drug, Babbitt, State Drug and McReynolds Drug, continued to sell Parke, Davis products at cut prices (Fdgs 23, 21, 20, 24; Tr. 367-69). Parke, Davis thereupon ceased to sell its products to those five retailers, and in addition brought their names to the attention of five wholesalers serving the District of Columbia and

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"A. That's correct.

"Q. Or they would be cut off?

"A. That's correct.

* * * *

"Q. And you would not sell to any retailer who sold below your suggested minimum prices?

"A. That's correct.

"Q. And you authorized no one to enter into an agreement?

"A. I wouldn't have the power to authorize anyone to make such an agreement.

"Q. Did you give them any such authorization?

"A. No." (Tr. 397)

Virginia (Fdgs 13, 14; Tr. 168, 203, 213, 296, 316). Three of these wholesalers, as a result of Parke, Davis' policy, attempted to stop their sales of Parke, Davis products to those retailers, although some such sales continued to occur (Fdg 14; Tr. 152-54, 169, 214, 304-06). Despite these refusals to sell, however, the retailers concerned continued to offer Parke, Davis products for sale at cut prices (Fdg 15; Tr. 81-83, 100-02, 116, 133; Pl. Ex. 2, 3, Tr. 57-60).

After about six weeks of this unsuccessful attempt to make effective the policy with regard to suggested retail prices, Parke, Davis' branch manager changed his approach. At the end of August, 1956, he informed some of the five retailers that Parke, Davis would sell to them regardless of the prices at which they resold its products, but would refuse to supply them if they advertised cut prices on such products in the newspapers or by window signs (Fdg 17; Tr. 70-71, 115, 123-25, 197-98, 330-34, 374-77, 379-80). Thereafter, one of the retailers, Dart Drug, ceased its newspaper advertising of cut prices on Parke, Davis products (Fdg 21; Tr. 55-56); and two others, State Drug and M. Reynolds Drug, took down their window signs (Tr. 116, 135). It does not appear that the other retailers, Standard Drug and Babbitt, took any action at all. (Fdgs 20, 21). Parke, Davis then resumed selling its products to all five retailers (Fdg 17; Tr. 116, 198, 335-36).

For a period of a month thereafter, there was no cut price advertising on Parke, Davis products in the District of Columbia, at least in the newspapers (Fdg 17; Pl. Ex. 10, Tr. 114; Tr. 71-73); the price-cutting retailers, however, continued to sell the Parke, Davis products at cut prices (Fdg 17; Tr. 70, 117, 135, 207). And, as the District Court found,

> "No evidence was introduced to show that the discontinuance of advertising by a few retailers for a short period of time had any effect whatsoever on the prices charged to the public for Parke, Davis and Company products." (Fdg 25).

Furthermore, the prices at which retailers resold Parke, Davis products at no time had any effect on the prices Parke, Davis itself received for those products (Tr. 398).

In November, 1956, vigorous cut-price advertising on Parke, Davis products broke out again (Tr. 56, 68-69), and it has continued ever since (Fdg 27; Tr. 68-69, 117, 138, 206-08). Parke, Davis, however, made no further effort to discourage price cutting or cut-price advertising on its products (Fdg 18; Tr. 57, 66, 116-17, 138); in fact, it abandoned any attempt to maintain retail prices in the areas in question, its efforts in this direction through the exercise of its right to choose its customers having proven wholly unsuccessful (Fdg 27; Tr. 229-32).

Appellant's Challenge To The District Court's Findings

None of the above facts found by the District Court appears to be controverted by appellant. The only controversy is as to whether in this history of Parke, Davis' brief and futile attempts to stop price cutting on its products there is proof of conspiracy, combination or agreement, or whether, as the District Court found, the proof shows no more than unilateral action by Parke, Davis.

Appellant's contention that an unlawful conspiracy was proven disputes the findings of the District Court at three points: appellant claims that there was an agreement between Parke, Davis and five retailers named as co-conspirators, obligating the retailers not to cut

prices on Parke, Davis products; that there was an agreement with the same five retailers that they would not advertise cut prices on Parke, Davis products; and that there was an agreement between Parke, Davis and five wholesalers named as co-conspirators that the wholesalers would not sell Parke, Davis products to the price-cutting retailers.[10]

(A) THE ALLEGED RETAILER CONSPIRACY REGARDING PRICES

The five retailers alleged to have agreed with Parke, Davis not to sell its products at cut prices were Dart Drug, Standard Drug, Drug Mart, Babbitt and Peoples (Plaintiff's Answer to Defendant's Interrogatory 2, February 19, 1958). The evidence shows, however, that Dart Drug and Standard Drug at no time agreed to stop cutting prices; in fact, they were cut off by Parke, Davis for the reason that they continued to cut prices on its products (Fdgs 23, 21; Tr. 32, 81, 82-83, 193-96). No witness was called from Babbitt, but the evidence shows that Babbitt was cut off (Fdg 20; Tr. 149-50, 300-01, 369), and it therefore indicates that Babbitt also must have continued to cut.[11] The witness from Drug Mart stated that that group ceased its occasional advertising of cut prices on Parke, Davis products after being informed of Parke, Davis' policy, but he affirmed that the individual stores could continue to sell at cut prices, and even to advertise those prices individually, if they saw fit (Tr. 187-88); this testimony was corroborated by another witness who was a member of that organization (Tr. 120-122), and is uncontradicted

[10] See note 1 *supra*

[11] There is some contradictory testimony by the proprietor of Dart Drug, who stated that around the middle of July Babbitt was not cutting prices on Parke, Davis products (Tr. 83). Other testimony of this witness is discussed at pp. 14-15 *infra*.

ed. As to none of these four supposed co-conspirators, therefore, is there any evidence whatsoever to support the charge of conspiracy with regard to prices.

No witness connected with the remaining retailer, Peoples, was called by the Government; the only direct testimony regarding Parke, Davis' dealings with Peoples was that of a Parke, Davis representative. This witness testified that he had told a vice president of Peoples that Parke, Davis would not sell to Peoples if Peoples cut prices on Parke, Davis products, and that the vice president replied that Peoples would stop cutting prices (Tr. 320-21, 346, 356). He also testified as follows: [12]

> "Q. . . . Did you make any agreement with Mr. Downey [the vice president of Peoples]?
> "A. Never.
> "Q. You simply told him that you would refuse to sell him if he continued to advertise or charge cut prices, right?
> "A. Correct." (Tr. 346)

(B) *THE ALLEGED RETAILER CONSPIRACY REGARDING ADVERTISING*

With regard to the supposed agreement not to advertise cut prices on Parke, Davis products, the same five retailers were alleged to be involved (Plaintiff's An-

[12] Other evidence bearing on Peoples' practices regarding its prices for Parke, Davis products includes the testimony of another witness that he was told by a Parke, Davis salesman that "Peoples was going to stop cutting prices, or had stopped cutting prices" (Tr. 185); testimony that prior to the visit from the Parke, Davis representative at which the Parke, Davis policy was discussed Peoples was cutting prices in only two of its stores (Tr. 34-36, 81, 83); and testimony indicating that Peoples' price cutting had never been very vigorous (Tr. 371).

swer to Defendant's Interrogatory 2, February 19, 1958). The Government's principal witness on this score—and, indeed, the main prop of the Government's case—was the proprietor of Dart Drug. This witness testified that he made not one but two agreements with Parke, Davis on the subject of advertising (Tr. 36-39, 51-53)—in fact, he used the words "agree" or "agreement" 14 times in his testimony (Tr. 32, 36, 38, 42, 53, 54, 71, 72, 77).[13] In spite of this pointed testimony, however, he conceded that both of the "agreements" amounted to no more than this:

> "Q. He [the Parke, Davis representative] simply said that . . . if you did advertise he wouldn't sell to you, and if you didn't he would?
>
> "A. That is right, sir.
>
> "Q. And you said to him that if somebody else advertises I am going to advertise?
>
> "A. That is right, sir." (Tr. 69-71).

The testimony of this witness must, of course, be considered along with such other evidence as the testimony of two Parke, Davis representatives that they had not sought, and did not have authority to seek, any agreement from this or any other retailer, but had merely stated Parke, Davis' policy to him, and left him to decide his own course of action (Tr. 318, 374-77, 379, 380, 397-98). It must, moreover, be weighed in a balance which includes evidence that he was the complaining

[13] In the companion criminal case, this witness testified that he had suggested to a vice president of Parke, Davis that "maybe there was some area of agreement we could have," and that the vice president had replied "nothing doing" (Tr. 74-75). In this case, his testimony was that the same vice president had asked him "if I was ready to agree to their terms" (Tr. 42).

witness who had instigated the investigation leading to this case (Tr. 79, 344); evidence that he had consulted with his lawyer with regard to the possibility of bringing a treble damage action against Parke, Davis on the basis of the subject matter of this suit (Tr. 86) and was attempting, in his dealings with Parke, Davis, to lay a foundation for such a suit (Tr. 30, 33, 35, 40, 42, 74-77); and the fact that his testimony in this case contradicted not only the testimony of other witnesses (compare Tr. 47 with Tr. 305, Tr. 52 with Tr. 345-46) but in addition his own testimony in both this and the companion criminal case (Tr. 71-73; Tr. 42, 74-75). The trial judge, who had all this evidence before him and was in a position to observe and assess the witnesses themselves, concluded that

> "Parke, Davis did not at any time solicit an agreement from, or make an agreement with, Dart Drug as to prices or advertising, but rather informed Dart of its policies and acted upon them." (Fdg 23).

One other alleged co-conspirator, Drug Mart, also ceased advertising price cuts on Parke, Davis products in response to a declaration of Parke, Davis' policy; although, as in the case of Dart Drug, all the member stores were entirely free to sell Parke, Davis products at cut prices even while the advertising was suspended (Fdgs 22, 23; Tr. 70, 109, 121-22, 187-88), and of course continued to advertise cut prices on other manufacturers' products (Pl. Ex. 2, 3, Tr. 57-60; Pl. Ex. 7, Tr. 110-11). The evidence regarding the reason for Drug Mart's action shows that a Parke, Davis salesman informed the "coordinator" of Drug Mart that Parke, Davis would not sell to any of the member stores if the

organization continued its occasional advertising of cut prices on Parke, Davis products (Tr. 185-86); that the coordinator told the salesman that "I would go along with him" (Tr. 186) and then asked the advice of the president of the organization (Tr. 186) and a committee of its members (Tr. 108-09); and that the committee decided by majority vote to stop the advertising in question in order not to be cut off by Parke, Davis (Tr. 108-09, 120-21).[14] Upon consideration of such evidence as this, the trial judge determined that

> "Parke, Davis did not solicit any agreement, and Drug Mart did not enter into any agreement or understanding of any kind with Parke, Davis concerning prices or advertising." (Fdg 22).

In addition to Dart Drug and Drug Mart, there were two other retailers, McReynolds Drug and State Drug, who responded to Parke, Davis' change in policy by temporarily taking down their window signs advertising cut prices on Parke, Davis products (Tr. 96, 116, 134-35, 332-34, 379-80). Neither of these, however, was even alleged to be a co-conspirator.[15] As to the three other retailers who were alleged to have conspired to

[14] The evidence also indicates that one reason why Drug Mart discontinued the advertising was that Parke, Davis had informed the buyer for Drug Mart, who had been passing along certain premium payments to the members of the organization for use as discounts on Parke, Davis products, that this was an improper use of such premium payments, and the buyer was therefore no longer interested in promoting Parke, Davis products (Fdg 22; Tr. 347-48).

[15] McReynolds Drug and State Drug were among the five retailers who were cut off by Parke, Davis because of their price cutting (Fdg 24; Tr. 102, 131-33) and restored as customers after the change in policy (Tr. 116, 135). Although as indicated they took down their window signs mentioning cut prices on Parke, Davis products in response to the change in policy, both stores at all times actually sold such products at cut prices (Tr. 117, 135).

stop advertising—Babbitt, Standard Drug and Peoples—there is a gaping lack of proof. The only proof of any response by any of them to Parke, Davis' change of approach was the testimony of the same principal complaining witness, Dart Drug's proprietor, that he was told all three were "back in line" on advertising (Tr. 37, 54-55). There was no witness from Babbitt, however, and no evidence of any conversations between Parke, Davis and that organization on the subject of advertising; nor even any evidence that Babbitt in fact did any advertising, let alone ceased to advertise. There was no witness from Peoples, either, and the evidence showed only that Peoples advertised Parke, Davis products once at cut prices and once at the recommended prices during the period in question (Pl. Ex. 8-10, Tr. 112-14), and that it was not unusual for Peoples to advertise at recommended prices (Tr. 385).[16] Finally, as to Standard, the evidence shows that a representative of that organization told a Parke, Davis representative that "we could not agree" to stop cut-price advertising (Tr. 198), that he made no commitment to stop it (Tr. 205, 323), and that Standard in fact advertised cut prices on Parke, Davis products while others were refraining from doing so (Tr. 71). As to each of these retailers, the trial judge found that

> "Parke, Davis did not solicit any agreement and Peoples [Babbitt, Standard Drug] did not enter

[16] The only evidence regarding any communication between Parke, Davis and Peoples on the subject of advertising was the testimony of a Parke, Davis representative, as follows:

> "Q. You simply told him [the vice president of Peoples] that you would refuse to sell him if he continued to advertise or charge cut prices, right?
>
> "A. Correct." (Tr. 346).

into any agreement or understanding of any kind with Parke, Davis concerning prices or advertising." (Fdgs 19-21).

Taking this proof—almost all of it oral testimony as a whole, and given the opportunity of the trial judge to observe the witnesses, there is ample support for his conclusion that the Government failed to prove the allegations of the complaint, and for his findings as to each of the retailers alleged to be co-conspirators, that there was no conspiracy as to either prices or advertising.

(C) *THE ALLEGED WHOLESALER CONSPIRACY*

With regard to the allegation of a conspiracy between Parke, Davis and the wholesalers not to sell Parke, Davis products to price-cutting retailers, five wholesalers are claimed to have been involved: District Wholesale, Washington Wholesale Drug Exchange, H. B. Gilpin Company, Powers-Taylor, and Murray Wholesale (Complaint, para. 5). The evidence shows that Parke, Davis advised each of these wholesalers of its policy with regard to sales to price-cutting retailers and brought to their attention the names of such retailers (Fdgs 12, 14; Tr. 168, 203, 213, 296, 316). But although a representative of Washington Wholesale Drug Exchange was called as a witness, he was not even asked by Government counsel whether he had curtailed sales to any retailers, and it was not shown that he in fact did so (Tr. 244-62).[17] No representative of Murray Wholesale was even called to testify, and although there is evidence that this

[17] Parke, Davis' branch manager and his assistant assumed, erroneously (See Tr. 197, 204), that all the wholesalers contacted ceased selling Parke, Davis products to the five retailers (Tr. 315-D, 373).

wholesaler was notified of Parke, Davis' policy,[18] there is no evidence that he undertook to, or did, act upon it. Moreover, the evidence shows that another wholesale drug firm not named as a co-conspirator continued to sell Parke, Davis products to at least one of the price-cutting retailers in question (Tr. 197, 204).

This leaves three wholesalers who did respond to Parke, Davis' policy by attempting to curtail sales of Parke, Davis products to the retailers: these are Powers-Taylor, H. B. Gilpin Company and District Wholesale. The president of Powers-Taylor, however, testified as follows:

> "Q. They [Parke, Davis representatives] did not ask you to make any agreement?
>
> "A. No, sir.
>
> "Q. And you did not make any agreement about Standard?
>
> "A. No, sir.
>
> "Q. You understood that, if you sold Standard, you would be cut off?
>
> "A. That is right." (Tr. 219.)

The evidence is the same as to the other two. The president of the H. B. Gilpin Company testified, for instance, that he neither was asked to make any agreement nor did make any agreement with the Parke, Davis representative who communicated with him (Tr. 172); the vice-president of the company explained that the basis for the company's attempt to stop selling to the price cutters was that if it continued to sell to them, it would itself be cut off

[18] A witness from Standard Drug testified that he had telephoned the president of that wholesaler, who "informed me that he had been notified by Parke, Davis and Company not to ship any of our stores their products." (Tr. 203).

by Parke, Davis (Tr. 154). As to District Wholesale, although the vice president of that company said that he had told the Parke, Davis representative, "I will go along with whatever you suggest" (Tr. 287-288; cf. Tr. 280, 289), the president of this company, who actually made the decision to cease selling to the retailers (Tr. 280, 282, 305), testified that the basis of that decision was simply the knowledge that unless the company cut off the retailers it would itself be cut off (Tr. 304).

Once again having considered this evidence as a whole, the trial judge found that

> "There is no evidence that Parke, Davis solicited any agreement, nor that any of the wholesalers made any agreement with Parke, Davis on this subject." (Fdg 14).

And this finding, like the others, is clearly supported by the proof. On this critical point as on the others, the Government totally failed to prove the allegations of the complaint.

THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

The critical findings of fact made by the District Court demonstrate that Parke, Davis' actions were purely unilateral, and that no element of agreement or conspiracy with the retailers and wholesalers was involved. Appellant urges the Court to review the evidence, set aside these explicit findings, and find that a conspiracy was proven. But those findings of fact, by the terms of Rule 52(a) of the Federal Rules of Civil Procedure,

> ". . . shall not be set aside unless clearly erroneous, and due regard shall be given to the oppor-

tunity of the trial court to judge of the credibility of the witnesses."

And as this Court observed in *United States v. Yellow Cab Co.*, 338 U.S. 338 at 341-42:

> "It ought to be unnecessary to say that Rule 52 applies to appeals by the Government as well as to those by other litigants. There is no exception which permits it, even in an antitrust case, to come to this Court for what virtually amounts to a trial *de novo* on the record of such findings as intent, motive and design. While, of course, it would be our duty to correct clear error, even in findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of evidence is not 'clearly erroneous.'"

See also *Timken Roller Bearing Company* v. *United States*, 341 U.S. 593, 596-97; *United States* v. *National Association of Real Estate Boards*, 339 U.S. 485, 495-96:

> "It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent. See United States v. Yellow Cab Co., 338 U.S. 338, 342; United States v. Gypsum Co., 333 U.S. 364, 394, 395. We are not given those choices, because our mandate is not to set aside findings of fact 'unless clearly erroneous.'"

The findings of the court below, which are supported by "substantial evidence," see *Schine Chain Theatres, Inc.* v. *United States*, 334 U.S. 110; *McAllister* v. *United States*, 348 U.S. 19, 22, are not shown to have been "clearly erroneous." No substantial question on the facts is, therefore, brought before the Court.

Nor is there any substantial question of law presented by the appeal, for the findings of the District Court clearly bring the case within the area of permissible conduct as defined in *United States* v. *Colgate & Co.*, 250 U.S. 300, 307:

> "In the absence of any purpose to create or maintain a monopoly, the [Sherman] act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell."

See also *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 625-26.

Parke, Davis, like the Colgate Company, recommended minimum resale prices to retailers, and attempted to obtain observance of those prices by a policy of refusing to sell to retailers who did not observe them. In carrying out that policy, it did no more than indicate its wishes concerning prices and decline further dealings with all who failed to observe them. See *United States* v. *A. Schrader's Son, Inc.*, 252 U.S. 85, 99. Parke, Davis did not authorize its agents to seek agreement from retailers or wholesalers, nor did

it obtain such agreement or anything more than "mere acquiescence" in its policy." See *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 723.

No more than this is to be found in the record of this case: no systematic machinery for the maintenance of prices,[19] no black-listing of price-cutters,[20] no cooperative methods of policing or reporting deviations,[21] no marking of goods so that price cutters can be traced,[22] no licensing agreements[23] or other formal arrangements.[24]

Nor is there any other circumstance in this case to give it substantial public importance. There is not even a suspicion of any adverse effect from the practices here called in question upon the vigorous competition between Parke, Davis and other manufacturers. Those practices occurred only in the two cities of Washington, D.C. and Richmond, Virginia, and over a period of no longer than four months, more than two years

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[19] See United States v. Bausch & Lomb Optical Co., 321 U.S. 707; Federal Trade Commission v. Beech-Nut Packing Co., 257 U.S. 441.

[20] See Federal Trade Commission v. Beech-Nut Packing Co., 257 U.S. at 450, 455-56.

[21] See United States v. Bausch & Lomb Optical Co., 321 U.S. at 720, 723; Federal Trade Commission v. Beech-Nut Packing Co., 257 U.S. at 454, 455-56.

[22] See United States v. Bausch & Lomb Optical Co., 321 U.S. at 714-15, 717; Federal Trade Commission v. Beech-Nut Packing Co., 257 U.S. at 449, 455-56.

[23] See Ethyl Gasoline Corp. v. United States, 309 U.S. 436; United States v. Bausch & Lomb Optical Co., 321 U.S. at 714-17.

[24] See United States v. A. Schrader's Son, Inc., 252 U.S. 85.

ago. They have long since been abandoned.[25] And even when they were in effect they did not achieve the intended purpose. Parke, Davis' attempt to put a stop to price cutting on its products was futile, and was abandoned in favor of an effort to stop just the cut-price advertising. This had some effect for a month—although even during this time there was no effect on the prices at which Parke, Davis products were actually sold to the public—and then this effort, too, failed and was abandoned. Naked assertion cannot give substance to the imaginary danger that the course of action that brought Parke, Davis no success at all "could become a wide-spread method for enforcing illegal resale price maintenance" (Jurisdictional Statement, p. 17).

On the law, in sum, there is no substantial question of variation from the long and well-established line of cases defining the area of permissible conduct by which a manufacturer can seek to maintain the level of its resale prices. On the evidence, which has already been assessed by two trial courts, there is no clear error even suggested that would warrant further consideration by this Court. The Court's observations in the *Yellow Cab* case, 338 U.S. at 339-41, apply fully here:

> "The first question proposed by the Government is whether the evidence sustains the findings of fact by the District Court. This is the basic issue, and the Government raises no question of law that has an existence independent of it. This issue of fact does not arise upon the trial court's disregard or misunderstanding of some definite and well-estab-

[25] The reasons for the abandonment of these practices are discussed by Parke, Davis' assistant general attorney at Tr. 229-32, 234. See Fdg 27.

lished fact. It extends to almost every detail of the decision, the Government saying that the trial court 'ignored . . . substantially all of the facts which the Government deemed significant.'

"What the Government asks, in effect, is that we try the case *de novo* on the record, reject nearly all of the findings of the trial court, and substitute contrary findings of our own.

* * * *

"The Judgment below is supported by an opinion, prepared with obvious care, which analyzes the evidence and shows the reasons for the findings. To us it appears to represent the considered judgment of an able trial judge, after patient hearing, that the Government's evidence fell short of its allegations—a not uncommon form of litigation casualty, from which the Government is no more immune than others."

This case is a particularly appropriate one for disposition upon a motion to affirm: the law is well settled, see *Missouri Pacific R. Co.* v. *Castle*, 224 U.S. 541, 544; and the case "as presented here turns essentially on questions of fact," *Bodkin* v. *Edwards*, 255 U.S. 221, 223, and "involves a mere dispute concerning the weight of conflicting tendencies of proof." *Chicago, R. I. & P. R.* v. *Devine*, 239 U.S. 52, 54. See *New Orleans Insurance Exchange* v. *United States*, 355 U.S. 22.

Appellee respectfully submits that the findings were correct and abundantly supported by the record, that there was no collusive agreement or conspiracy, and that its actions were taken unilaterally for valid business reasons and were wholly consistent with law.

CONCLUSION

This appeal presents no substantial question warranting further argument. The judgment of the District Court should be affirmed.

Respectfully submitted,

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